Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1994

RICHARD L. FISHELL
and
DOROTHY M. FISHELL

Petitioners

vs

ROBERT SOLTOW
and
ROSALEE SOLTOW
and
JOHN A. PORTER, Trustee

Respondents

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Lester N. Turner
1005 Timber Pass
Harbor Springs, MI
49740
(616) 526-9222
Counsel for Petitioners

53 pp

QUESTIONS PRESENTED

1. Whether the bankruptcy court, in considering a contested Rule 9019 motion brought by a Chapter 7 Trustee, complies with the requirements set forth in Protective Committee for Stockholders of TMT Trailer Ferry v Anderson, 390 US 414 (1968) by approving the compromise of an adversary proceeding and a claims objections proceeding when the terms of that compromise produce a $2,000 payment to the estate in return for the estate's relinquishment of an opportunity to recover property valued at $1.38 million and where the court

a. neither requires nor receives testimonial or other evidentiary submissions of any kind;

b. neither allows, disallows or otherwise values the "Proof of claim" being resolved by the compromise;

c. neither discusses nor analyzes

the facts, the merits or the legal issues raised by that "Proof of Claim";

d. neither discusses nor analyzes the facts, the merits or the legal issues raised by the various counts of the complaint in the adversary proceeding being resolved by the compromise; and

e. renders approval of the compromise without setting forth any findings of fact or conclusions of law related to the merits of the "claim" or the causes of action stated in that adversary complaint.

2. Whether the panel decision results in the creation of a conflict between the law of the 6th Circuit and the law of the 7th and 9th Circuits, as well as that set forth by the United States Supreme Court.

3. Whether the panel decision in this case announces a departure from prior precedent concerning evidentiary standards

or burdens placed upon compromise proponents in compromise proceedings in bankruptcy court under Rule 9019 of the Bankruptcy Rules.

4. Whether the panel decision in this case announces a departure from prior precedent concerning the adequacy of the compromise hearing record which must be made before the bankruptcy court so that an appellate court may determine whether the bankruptcy court has rendered "an informed and independent judgment" on the propriety of a compromise which that court approves.

5. Whether the panel decision properly determined that the Debtors lacked standing to appeal an order of the bankruptcy court, rendered pursuant to Rule 9019, entered over the Debtors' objection, where no 6th Circuit authority is cited in support of the panel decision and the panel decision conflicts with the decision of the 1st Circuit, cited

by the panel as authority, and conflicts with 7th circuit authority more directly and factually relevant.

6. Whether Debtors in cases, such as this one, which are not "no-asset" cases may be denied standing to appeal an order, rendered pursuant to Rule 9019, entered over their objection where such order, both, forecloses the Debtors from possible recovery of property through an adversary proceeding and concurrently forecloses consideration of the Debtors objection, filed pursuant to Rule 3007, to a Proof of Claim filed against their bankruptcy estate.

STATEMENT PURSUANT TO RULE 14.1(b)

Richard L. Fishell and Dorothy M. Fishell are individual petitioners.

Robert Soltow and Rosalee Soltow are individual respondents.

John A. Porter is an individual respondent who is acting in the capacity of Chapter 7 Trustee of the petitioners' bankruptcy estate.

TABLE OF CONTENTS

Questions Presented.....i

Statement Pursuant to Rule 14.1.....v

Table of Contents.....vi

Table of Authorities.....ix

Opinions Below.....1

Jurisdiction.....2

Statutes Involved.....4

Statement of the Case

Introduction.....5

Fact Summary.....8

Argument.....15

Reasons for Granting the Writ.....29

Conclusion.....39

Appendix

Order of Court of Appeals Denying Petition for Rehearing and Suggestion for Rehearing En Banc.....A1

Opinion of Court of Appeals Affirming the District Court.....A3

Order of District Court Affirming the Bankruptcy Court.....A19

Opinion of the District Court.....A21
Order of the Bankruptcy Court
Denying Debtors' Motion for
Rehearing.....A39
Transcript-Hearing on Debtors'
Motion for Rehearing.....A42
Order of Bankruptcy Court
Determining Debtors' Objection
to Proof of Claim to be Moot.....A85
Debtors' Amended Motion for
Rehearing; re approval of
settlement.....A88
Stipulation and Order of Dismissal
and Cancellation of Lis Pendens....A95
Stipulation and Order of Dismissal
of Counterclaim.....A99
Order Granting Trustee's Motion
to Approve Settlement.....A102
Transcript-Hearing on Trustee's
Motion to Approve Settlement.....A105
Trustee's Motion to Approve
Settlement and Release and

Settlement Agreement, Trustee and Soltow.....A163

Debtors' First Amended Complaint in Adversary Proceeding, Fishell v Soltow (91-8015).....A184

Statutes

11 USC 502(a), (b).....A217

28 USC 158(a), (d).....A220

28 USC 1254(1).....A221

Rules

Rule 3007, Fed R Bankr Pro.....A222

Rule 9019, Fed R Bankr Pro.....A222

Rule 9023, Fed R Bankr Pro.....A222

State Statutes

MSA 27A.2701 et seq.....A223

Debtors' Petition for Rehearing and Suggestion for Rehearing En Banc filed in Court of Appeals.....A233

Plaintiffs'(Debtors) Brief re Summary Judgment, filed 3 May 1991 in bankruptcy court.....A257

TABLE OF AUTHORITIES

Cases

In Re A & C Properties
784 F 2d 1377 (9th Cir 1986) cert den
479 US 854, 107 S Ct 189, 93 L Ed 2d
122 (1986).....15

In Re American Reserve Corporation
841 F 2d 159 (7th Cir 1987).....15

In Re Andreucetti
975 F 2d 413 (7th Cir 1992)...24, 27, 33

In Re Boston and Providence Railroad
673 F 2d 11 (1st Cir 1982).....20

In Re Chateaugay Corporation,
64 BR 990 (DC SD NY 1986).....32

In Re Commercial Western
Finance Corporation,
761 F 2d 1329 (9th Cir 1985).....25

In Re Corrugated Container Anti-Trust
Litigation,
643 F 2d 195 (5th Cir 1981).....19

Cotton v Hinton
559 F 2d 1330 (5th Cir 1977).....19

In Re El San Juan Hotel
809 F 2d 151 (1st Cir 1987).....28, 33
In Re Flight Transportation
Corporation Securities Litigation,
730 F 2d 1128 (8th Cir 1984).....38
In Re Hydronic Enterprises Inc.
58 BR 363 (Bankr D RI 1986).....15
In Re International Environmental
Dynamics Inc.,
718 F 2d 322 (9th Cir 1983).....25
Kane v Johns-Manville Corporation,
843 F 2d 636 (2d Cir 1988).....26
Katchen v Landy
382 US 323, 86 S Ct 467, 15 L Ed 2d
391 (1966).....30, 33
Matter of AWECO, Inc.
725 F 2d 293 (5th Cir 1984) cert den
469 US 880, 105 S Ct 244, 83 L Ed 2d
182 (1984).....21, 22, 23, 38
Matter of Jackson Brewing Company
624 F 2d 605 (5th Cir 1980).....20

Mitchell v Robert DeMario Jewelry Inc.,
361 US 288, 80 S Ct 332, 4 L Ed 2d
323 (1960).....30
Mulligan v Sobiech
131 BR 917 (DC SD NY 1991).....32
Pettway v American Cast Iron Pipe
Company, 576 F 2d 1157 (5th Cir)
cert den 439 US 1115, 99 S Ct 1020,
59 L Ed 2d 74 (1978).....23
Plummer v Chemical Bank,
668 F 2d 654 (2d Cir 1982).....19, 20
Protective Committee for Stockholders
of TMT Trailer Ferry v Anderson,
390 US 414, 88 S Ct 1157, 20 L Ed 2d 1
(1968) reh den 391 US 909, 88 S Ct 1649,
20 L Ed 2d 425 (1968).....passim
Saylor v Lindsley,
456 F 2d 896 (2d Cir 1972).....23
Segal v Rochelle,
382 US 375, 86 S Ct 511, 15 L Ed 2d
428 (1966).....30, 33

United States v Embassy Restaurant, Inc.,
359 US 29, 79 S Ct 554, 3 L Ed 2d
601 (1959).....30
In Re Walsh Construction Inc.
669 F 2d 1325 (9th Cir 1982).....19, 23
In Re Woodson,
839 F 2d 610 (9th Cir 1988).....23

Statutes

11 USC 502.....27
11 USC 554.....27
11 USC 726.....27
28 USC 158(a).....2
28 USC 158(d).....3
28 USC 1254(1).....3
MSA 27A.2701, et seq.....9

Rules

Rule 10, Rules of the Supreme Court
of the United States.....29, 30, 32, 33
Rule 3007, Fed R Bankr Pro.....9, 27, 32

Rule 8002, Fed R Bankr Pro.....2

Rule 9011, Fed R Bankr Pro.....14

Rule 9019, Fed R Bankr Pro.....passim

Rule 9023, Fed R Bankr Pro.....2, 14

Rule 35, Fed R App Pro.....3

Rule 40, Fed R App Pro.....3

Rule 14, 6th Circuit.....3

OPINIONS BELOW

The 16 February 1995 decision of the United States Court of Appeals for the Sixth Circuit, Case No 94-1109, was not reported, however the opinion is reprinted in the Appendix to this petition at (A3). No opinion was rendered by the Court of Appeals in its denial of Petitioners' Petition for Rehearing and Suggestion for Rehearing In Banc. (A1)

The decision of the United States District Court, Western District of Michigan, Case No 1:92cv845, is also unreported, however the opinion is reprinted in the Appendix to this petition at (A19,21). The decision of the United States Bankruptcy Court, Western District of Michigan, Case No 90-85144 (Adv Pro # 91-8015),was also unreported, however those orders are reprinted in the Appendix to this petition at (A39,95,99,102).

JURISDICTION

The orders from which the petitioners appealed were entered on the 14th, 17th & 20th days of July 1992 (A95,99,102) by the United States Bankruptcy Court, Western District of Michigan. A Motion and Amended Motion for Rehearing thereof were filed by petitioners on the 21st day of July 1992 which were timely under Rule 9023, Fed R Bankr Pro. The Debtors' amended motion for rehearing was denied by the Bankruptcy Court on the 25th day of August 1992 (A39). Petitioners timely filed a notice of appeal to the United States District Court, Western District of Michigan, on the 3d day of September 1992. The District Court had jurisdiction pursuant to 28 USC 158(a); Rule 8002(b), Fed R Bankr Pro.

The United States District Court, Western District of Michigan, affirmed the bankruptcy court in its opinion and order of 7th December 1993. (A19,21) The petitioners timely

filed their notice of appeal to the United States Court of Appeals, Sixth Circuit, on the 5th day of January 1994. The United States Court of Appeals had jurisdiction pursuant to 28 USC 158(d). The decision of the District Court was affirmed by the United States Court of Appeals on the 16th day of February 1995. (A3). Petitioners timely filed a Petition for Rehearing and Suggestion for Rehearing In Banc on the 2d day of March 1995, pursuant to Rules 35 and 40, Fed R App Pro and 6th Circuit Rule 14. See (A233) The petition and suggestion were each denied by the Court of Appeals on the 6th day of April, 1995. (A1)

This Court has jurisdiction pursuant to 28 USC 1254(1).

STATUTES INVOLVED

Title 11, United States Code, Section 502(a) and (b) are reprinted at (A217).

Title 28, United States Code, Section 158(a) and (d) are reprinted at (A220).

Title 28, United States Code, Section 1254(1) is reprinted at (A221).

RULES INVOLVED

Rule 3007, Federal Rules of Bankruptcy Procedure is reprinted at (A222).

Rule 9019, Federal Rules of Bankruptcy Procedure is reprinted at (A222).

Rule 9023, Federal Rules of Bankruptcy Procedure is reprinted at (A222).

STATE STATUTES

MSA 27A.2701 et seq., is reprinted at (A223).

STATEMENT OF THE CASE

INTRODUCTION

Petitioners, Debtors in a Chapter 7 bankruptcy case, contested the compromise of an adversary proceeding by the bankruptcy court pursuant to Rule 9019(a), Fed R Bankr Pro. The compromise was made between the Chapter 7 Trustee and Robert Soltow, the Debtors' litigation opponent in an adversary proceeding.(A163, 169) The compromise also included resolution of a proof of claim filed by Soltow to which the Debtors had objected. The adversary proceeding was commenced in state court by the Debtors, prior to bankruptcy, and sought to recover title to 43 acres of real property. (A 184). Following the filing of Debtors Chapter 11 in 1990, the state suit was removed to bankruptcy court.

Soltow and others procured conversion of the case to Chapter 7 in January 1992. Shortly thereafter the Trustee replaced the

Debtors counsel in the adversary proceeding and Soltow filed a Proof of Claim against the estate alleging that the Debtors had slandered the title to the property in dispute when they filed a lis pendens in conjunction with the original filing of the state court suit.(A223) The Debtors filed an objection to this claim which was set for hearing on 22 July 1992. (A85) The trial of the adversary proceeding was set for August 1992. (A116) On 12 June 1992, however, the Trustee and Soltow "settled" the suit and Proof of Claim (A169) and submitted the same for court approval.(A 163) The Debtors objected. A hearing was held on 10 July 1992 and the court approved the compromise at that time, since immediate approval was required by Soltow. (A102,105) The Debtors' objection to Soltow's proof of claim was rendered moot.(A85) The court denied Debtors motion for rehearing of the approval of the compromise.(A39) Thereafter, the Debtors

pursued the appeal process.

The Debtors contended that the compromise was not reasonable; that the court had failed to comply with the substantive and procedural prerequisites to a valid approval under Rule 9019; and that the record could not support the propriety of the compromise under controlling case law. Soltow contended, among other things, that the Debtors lacked standing to appeal. The appellate courts addressed both issues, finding that the Debtors lacked standing to appeal and that, in any event, the bankruptcy court had not abused its discretion in approving the settlement. (A19,21)(A1,3)

FACT SUMMARY

The subject of the proposed compromise was a pending adversary proceeding brought by the Debtors against Soltows which sought cancellation of a deed from Fishells to Soltows. (A184)(A257) The adversary complaint alleged that the transfer to Soltow had involved issues of fraud, misrepresentation, lack of consideration, usury and the theory that Soltow had not acquired absolute title to the property but that the deed was, in equity, a mortgage. The property consisted of 43 acres of vacant but improved land and was valued at $1.3-$1.5 million, by the parties and an independent appraisal. At the time of the disputed transfer to Soltow in 1989, Soltow held an amended mortgage on the property of approximately $610,000. The original mortgage principal of $350,000 was modified in 1988 when various documents giving rise to the disputed transfer were prepared and executed. Usury infected (A257)

promissory notes underlying the mortgage. (A160) The Debtors action to set aside the deed was commenced in Michigan state court and removed to the bankruptcy court when the voluntary chapter 11 petition was filed in November 1990.

On the motion of Soltow, his attorneys and the US Trustee, the case was converted to Chapter 7, over the Debtors' objection, in January 1992. Shortly thereafter Soltow filed a Proof of Claim in the sum of $250,000 contending that the suit to recover title and the filing of a lis pendens in conjunction with that suit had slandered the title to the disputed property. Filing of the lis pendens was authorized by statute. MSA 27A.2701.

The Debtors' objection to Soltows' proof of claim was set for hearing on 22 July 1992. (A85) See Rule 3007, Fed R Bankr Pro. The adversary proceeding seeking recovery of the property was set for trial in August 1992. (A116). But, in June 1992, the Trustee and

Soltow entered into a Release and Settlement Agreement (A 163, 169) which provided for dismissal of both the adversary proceeding and the Soltow slander claim. Soltow expressly conditioned the agreement on its obtaining court approval on 10 July 1992, or prior to either the claims objection hearing or the trial of the adversary complaint. (A 105) The Trustee moved the court for approval of this compromise under Rule 9019 (A 163) and the lone hearing, lasting an hour, on the issue of settlement took place on 10 July 1992. See (A 105) The Trustee's unsworn motion did not contain or accompany any affidavit or other evidentiary material.(A 105, 163)

The 10 July 1992 approval hearing before the bankruptcy court involved the argument of counsel only. (A 105, 147) The Debtors were allowed 20 minutes in opposition to the settlement and Soltow and the Trustee, the proponents, were allowed 40 minutes. (A109)

The proponents submitted no witnesses or other evidence in any form. (A147) The proponents did not analyze the law that was to apply to the causes of action stated in the complaint. The proponents did not outline the evidence which they perceived might be offered at trial. The proponents did not submit proposed findings of fact or conclusions of law for the court to review or act upon. Counsel for the Trustee noted that the court was "relatively aware of the facts of the adversary proceeding" (A111). The proponents did not analyze the facts or the law relating to the Proof of Claim filed by Soltow.

The Debtors proposed that no settlement be approved until independent hearing of the Soltow Proof of Claim on 22 July, (A144) however this was opposed by Soltow and the Court declined to wait. The Debtors submitted a memorandum to the court on the slander of title issue, but the court dec-

lined to read it prior to ruling. (A144-145)

The arguments of the proponents were no more than arguments and were speculative in nature. Generalized assertions about possible future costs and possible future delays formed the bulk of the argument in support of the proposed settlement. There was virtually no discussion of the merits of the legal issues involved.

Immediately at the close of argument, the court entered upon its ruling. (A154-162) This recitation of the background of the case does not go beyond the meager description set forth in the Joint Release and Settlement Agreement executed between the Trustee and Soltow. (A163, 169) Other than the issue of usury, no other issue, claim or cause of action involved in the adversary proceeding was noted in the court's ruling. No mention was made of the slander claim raised in Soltow's Proof of claim. The entirety of the Debtors' complaint (A 184)

had focused on matters which would have vitiated the Fishell/Soltow agreement of 1988, yet the entirety of the recitation given by the proponents in their argument, and given by the court in its ruling, is limited to the abbreviated overview of the origin of the disputed transaction, rather than to any explanation of the legal issues raised by that complaint. (A 105, 163).

As a result of the approval of the settlement, Soltow's Proof of Claim (mischaracterized as a counterclaim) was dismissed and the Debtors' adversary complaint was also dismissed. (A95,99,102) Soltow paid $2,000 to the estate and, in return, the Trustee released, to Soltow, the estate's claim for recovery of the 43 acres of real property (and with it a potential equity for the estate and the Debtors of $500,000 to $900,000, or more). (A 163).

There is no indication, in the compromise proceedings, from either the court or

the proponents, as to how it was determined that this particular compromise (as opposed to one on alternative terms or as opposed to any compromise at all) was both fair and reasonable or "fair and equitable." The Debtors sought rehearing, which was denied[1], and thereafter commenced their appeal process.

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1. It is evident from the transcript of the hearing on Debtors' motion for rehearing (A42) that the trial judge did not perceive the requirements of Rule 9019 or of TMT. Counsel for Soltow did not assist in enlightening the court by offering that the settlement could have been approved "in chambers". (A59,60) Counsel for the Trustee, likewise, provided no guidance on the proper settlement standards (A62-65). The court was presented with relevant authorities on Rule 9019, (A54), which the court declined to review before ruling. At the conclusion of this argument, the court immediately entered upon its ruling, denying the motion and reiterating its prior recollections from the settlement hearing of 10 July.(A67-73) In addition, the court concluded that the Debtors' Rule 9023 motion and argument was a violation of Rule 9011 and imposed sanctions on Debtors' counsel. (A39,42, 73-84).

ARGUMENT

Rule 9019 Compliance

For there to be compliance with the TMT standard, far more was required of the court and the proponents than was shown by either in this case.[2] The decisions of the appellate courts (A3)(A 21) could not create or unearth a record which was not created in the bankruptcy court in the first instance, though each of the those courts attempted to do so.

The principal reason, it appears, for the rule of TMT, which requires that there be some record of the bankruptcy court's "evaluation of the facts and analysis of the law" is to provide some basis for appellate

2. The proponents bear the burden of persuasion on the issue of the compromise. In Re Hydronic Enterprises Inc., 58 BR 363 (Bankr D RI 1986); In Re A & C Properties 784 F 2d 1377 (9th Cir 1986). The Court has an independent duty to apprise itself of the facts and the law necessary to make an independent judgment about whether the settlement should be approved. In Re American Reserve Corporation, 841 F 2d 159 (7th Cir 1987).

review. In this case, the lower appellate courts were unable to analyze the specific facts or legal issues involved in the Soltow claim or in the Debtors adversary proceeding because the bankruptcy court did not set out what facts and issues it considered in reaching its conclusions. See (A154-162) The bankruptcy court did not even set out its conclusions as to the Proof of Claim or as to any of the causes of action in the complaint. The appellate courts could not say which factors were weighed by the bankruptcy court, or whether such factors were correctly weighed or analyzed because those specific factors, and the bankruptcy court's reasoning regarding them, are nowhere to be found.

TMT states that "without evaluation of the facts or analysis of the law" review is not possible because "an appellate court... must have a basis for judging the exercise of the trial court's discretion." Here,

there was no bankruptcy court evaluation of the facts or analysis of the law and for that reason, the District Court and the Court of Appeals did not have any basis for judging the exercise of the bankruptcy court's discretion. Those courts, which were required to examine the bankruptcy court decision under the "abuse of discretion" standard, had no predicate upon which to base a decision. In the absence of an outline of the factors which produced the decision of the bankruptcy court, no judgment about the bankruptcy court's exercise of discretion could possibly be made.

The appellate court decisions in this case are based largely on speculation about what the bankruptcy court "might" have considered or upon what the full reach of the court file "might" have contained. However, merely because the entirety of an available court file may have contained all the information necessary for a proper "evaluation"

or "analysis" is not enough. The decisions of the District Court and Court of Appeals, however, rest on little more than such speculation, given the inadequate record made at the settlement hearing. The TMT standard requires that the focus be upon what the trial judge actually considered, evaluated and analyzed, not upon what he might have had an opportunity to consider, evaluate and analyze.

The decision of the Sixth Circuit to uphold a decision which the bankruptcy court made, without compliance with the standards prescribed by TMT, constitutes a departure from the rule of TMT and a departure from the authorities noted in the Sixth Circuit opinion as well.

The decision of the court of appeals in this case finds no support among the circuits. Some circuits have explicitly required that stated or written findings of fact be made which can be supported by

an adequate record at the settlement proceeding. See In Re Walsh Construction. Inc., 669 F 2d 1325 (9th Cir 1982)(reversal required where no proper findings are made which are supported by an adequate record): Cotton v Hinton, 559 F 2d 1330 (5th Cir 1977); In Re Corrugated Container Anti Trust Litigation, 643 F 2d 195 (5th Cir 1981)(court reversed; finding that new findings and evidence were required); Plummer v Chemical Bank, 668 F 2d 654 (2d Cir 1982)(settlement must have evidentiary foundation and findings are necessary to permit review; and those findings and conclusions should not be based "simply on arguments and recommendations of counsel").

In short, unless a court's approval of a settlement is based upon

> "'well reasoned conclusions arrived at after a comprehensive consideration of all relevant factors' its decision will not survive appellate review. (citing TMT and others)."

Plummer v Chemical Bank, above, at 659. In Boston and Providence Railroad Corporation, 673 F 2d 11 (1st Cir 1982) the court said that a Trustee's petition and supporting affidavit which was conclusory in form was not adequate under the TMT standard and that reversal was required. That court noted, regarding the lower court ruling, at p. 13

> "even if the court was drawing on other information, beyond the petition and affidavit, its findings and order do not demonstrate an independent evaluation of that information ...the court must act independently, out of its own initiative, for the benefit of all creditors. This obligation prevails even where the creditors are silent. (citing TMT)"

The Trustee/Soltow motion suffers the same deficiencies. (A 163). Further, the bankruptcy court opinion (A 154-162) did not expand on the contents of that motion.

Matter of Jackson Brewing Company, 624 F 2d 605 (5th Cir 1980) sets forth a proper

description of the TMT standard, stating

> "the supreme court has explained that review on appeal must be grounded on clear support in the record, coupled with sound analysis..."

The approval of the Trustee/Soltow settlement in the present case fails both of these tests because, 1) there was no stated findings of fact, written or otherwise and no other evidentiary record was created at the settlement hearing (A 105-162) and 2) there was no analysis. pertinent to the issues being compromised, created at the settlement hearing.

In the case of Matter of AWECO, Inc., 725 F 2d 293 (5th Cir 1984), the court reversed approval of a settlement despite the fact that some evidentiary proceedings had taken place in the bankruptcy court. That court noted as follows at 299

> "...the First Circuit observed: [In approving compromises] 'the court must act independently, out of its own initiative, for the benefit of all

creditors. This obligation prevails even where creditors are silent'. (cites omitted) We agree. An approval of a compromise absent a sufficient factual foundation, inherently constitutes an abuse of discretion.

Given the nature of settlements and of this one in particular, it is not difficult to understand the dearth of information. United exerted pressure upon AWECO to gain approval of the settlement quickly...Time pressure apparently influenced the bankruptcy judge to deny the government's request for a continuance to develop evidence... In an analogous situation in Protective Committee v Anderson, 390 US at 450, 88 S Ct at 1176, the Supreme Court voiced its sympathy with the desire of a court to terminate protracted bankruptcy proceedings. However, the Court observed that, 'the need for expedition is not justification for abandoning proper standards.' Id...the circumstances below, surrounding approval of this settlement, called for a pause. Proof of value must find expression in definite numbers, not figures merely opined, mentioned or guessed. The bankruptcy judge should not reach for his stamp marked "approved" unless some party supplies concrete facts ...Furthermore, decisions as central to bankruptcy proceedings as approval of settlements can not be visceral. They must issue from reason

and rest upon factual underpinnings."

The Trustee/Soltow compromise scenario is quite similar to the one presented in AWECO.[3]

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3. Soltow announced at the 10 July 1992 hearing that approval was required that day. (A116) Final approval, achieved a mere one hour later, shielded Soltow's slander of title claim from scheduled scrutiny on 22 July (A86, 99) and prevented a trial on the merits of the complaint in August 1992 (A 116). The slander claim was not addressed by the court at the 10 July settlement hearing (A 105) nor at the hearing on the motion for rehearing (A42) and thus, the lack of merit in that claim was not openly revealed.

As noted court approval was achieved on argument of counsel alone. This was not sufficient. See Saylor v Lindsley, 456 F 2d 896 (2d Cir 1972); Pettway v American Cast Iron Pipe Company, 576 F 2d 1157 (5th Cir) cert den 439 US 1115, 99 S Ct 1020, 59 L Ed 2d 74 (1978). As noted by counsel for the Trustee (A111) the court was "relatively aware" of the facts of the adversary proceeding. No similar contention was made about the court's "awareness" regarding the Soltow proof of claim being compromised at the same time. Without consideration by the court of an issue of the signficance of the Proof of Claim, no overall determination of "fair and equitable" could have been made. See In Re Walsh Construction Inc., above, 669 F 2d at p. 1330-31 (finding of "fair and equitable" not possible where record is silent on a critical component of the compromise); In Re Woodson, 839 F 2d 610 (9th Cir 1988)(bankruptcy court may not, without reason, completely ignore non-frivolous objection).

Standing to Appeal

The District Court concluded that the Debtors lacked standing to appeal the bankruptcy court decision to approve the compromise.(A21) This conclusion was approved by the court of appeals.(A3)

The Debtors argued below that the standing issue was best analyzed with reference to the 7th Circuit case Matter of Andreucetti,975 F 2d 413 (7th Cir 1992). The Trustee/Soltow settlement forever barred the Debtors from achieving any recovery of the 43 acres (and with it the largest potential asset of their estate). Andreucetti found standing under circumstances substantially similar to those presented here, i.e. where the Debtors challenge a compromise which deprives them of an opportunity to emerge from bankruptcy with a surplus. At p 417, the Court stated

> "...(debtors) interest in gaining the possible surplus has been affected by the confirmation of the plan, and they possess a pecuniary interest that could be

> directly and adversely affected by the confirmation order. This alleged injury is sufficiently direct to allow for standing."

Other illustrations of similar analyses exist. In In Re International Environmental Dynamics Inc., 718 F 2d 322 (9th Cir 1983) a contestant seeking creditor status and payment from a fund accumulated by a debtor-in-possession was allowed standing to appeal an order awarding attorneys fees from that fund since

> "...in a case involving competing claims to a limited fund, a claimant has standing to appeal an order disposing of assets from which the claimant seeks to be paid. (claimant) satisfies this test for standing because it asserts a claim to funds that the bankruptcy court awarded to the (attorney)."

The same analysis applied in In Re Commercial Western Finance Corporation, 761 F 2d 1329 (9th Cir 1985) wherein an order confirming a plan involving elimination of investors' interests in notes and deeds of trust gave those investors standing to

appeal that confirmation order because

> "...The plan eliminated their interests in the borrower notes and deeds of trust and disposed of the assets in the estate from which they seek to be paid."

Similarly, in Kane v Johns-Manville Corporation, 843 F 2d 636, 642 (2d Cir 1988) the court noted that

> "as a general rule, creditors have standing to appeal orders of the bankruptcy court disposing of property of the estate because such orders directly affect the creditors ability to receive payment of their claims. (cites)"

In Kane, the creditor had standing to appeal confirmation of a Chapter 11 plan because

> "...a creditor has economic interests that are directly impaired by the Plan...Kane might receive more under this plan than he would receive in a liquidation. However, he might do better still under alternative plans. Since the Second Amended Plan gives Kane less than what he might have received, he is directly and adversely affected pecuniarily by it, and he therefore has standing to challenge it on appeal."

The same may be said of the Debtors in the present case. Had the bankruptcy court

properly analyzed the matters proposed for compromise, the one approved might have been rejected and given rise to a better one or none at all.[4] Because it was conceivable that the continuation of the adversary proceeding offered the possible return of value to the estate which far exceeded all filed claims, the Debtors had a pecuniary interest which was foreclosed by approval of the Trustee's settlement. See Andreucetti, above, and (A131-144)

Furthermore, under 11 USC 726(a)(6), the Debtors are entitled (as the lowest priority) to receive distribution from the Trustee upon completed liquidation, to the extent that assets are available. Debtors are, in

4. For this reason, Soltow's Proof of Claim was critical. Had the court determined the slander claim to be without merit or had the court valued that claim as contemplated under 11 USC 502 upon objection under Rule 3007, no estate assets may truly have been at risk in the litigation and, thus, no reason would have existed which would have prevented trial, or an abandonment of the action, to the Debtors, under 11 USC 554. The bankruptcy court simply never focused on the lis pendens/slander issue.

truth, creditors of their own estate, or claimants to a fund, just as other creditors are claimants to that fund. Only the "size" of the fund determines whether they shall receive distribution. therefore the size of that fund, particularly in circumstances such as those presented here, directly affects their "pecuniary interest". The Trustee/Soltow settlement forever terminated the adversary proceeding and with it the prospect of the Debtors recovery therefrom. The loss of an opportunity to recover an asset of the value or magnitude represented by the 43 acres clearly, and adversely. affected these Debtors and their creditors as well.[5] This would accord standing to the Debtors under any analysis above.

5. As to the Debtors. the compromise did "impair their rights" under the In Re El San Juan Hotel, 809 F 2d 151 (1st Cir 1987). standard. El San Juan is not otherwise controlling. The present case is not a "no asset" case (A241-242). Further. the litigant denied standing in El San Juan was not. by virtue of such denial, deprived of all means of protecting his interests in that case.

REASONS FOR GRANTING THE WRIT

This case involves a question of the procedure to be followed by a bankruptcy court in the consideration of a proposed compromise of litigation affecting the Debtors, creditors and the estate. This issue was deemed of sufficient significance to merit review in this Court in Protective Committee for Stockholders of TMT Trailer Ferry v Anderson, 390 US 414 (1968). This Court, in "TMT", set forth guidelines which must be followed by a lower court in rendering a decision to approve or disapprove settlements of litigation in bankruptcy court. For the reasons noted, the decision of the Court of Appeals below conflicts with the mandates of TMT. A conflict of this nature will merit the granting of the writ. See Supreme Court Rule 10(c).[6]

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6. The 6th Circuit decision here conflicts with the decision in Protective Committee for Stockholders of TMT Trailer Ferry v Anderson, above, because it approves a standard for compliance with Rule 9019 far less rigorous than imposed by TMT.

By virtue of the decision of the Court below, the Sixth Circuit is now in conflict with the 5th, 7th and 9th circuit courts of appeal in the interpretations given of the requirements of TMT. The decision of the Sixth Circuit approves bankruptcy court approval of proposed compromises where bankruptcy court consideration is limited to the argument of counsel. No evidentiary submissions, no findings of fact or other evidence of bankruptcy court review or analysis of the litigation issues appears to be required by the sixth circuit. No other circuit court of appeal has authorized such an informal procedure. As such, the decision of the 6th Circuit conflicts with the 7th and 9th circuits.[7]

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7. See Supreme Court Rule 10.1(a)(Circuit court conflict proper basis for certiorari); United States v Embassy Restaurant Inc, 359 US 29, 79 S Ct 554, 3 L Ed 2d 601 (1959); Mitchell v Robert DeMario Jewelry Inc., 361 US 288, 80 S Ct 332, 4 L Ed 2d 323 (1960); Katchen v Landy, 382 US 323, 86 S Ct 467, 15 L Ed 2d 391 (1966); Segal v Rochelle, 382 US 375, 86 S Ct 511, 15 L Ed 2d 428 (1966).

such a procedure provides no means for a reviewing court to assess the propriety of a settlement when approved in such a manner, as there exists no means by which to judge whether such a settlement meets the standard of "fair and equitable". Therefore the 6th Circuit decision, here, directly limits or contravenes a basic standard or purpose of TMT. A question of the proper application of a Supreme Court precedent presents a valid basis for granting the writ. Supreme Court Rule 10.1(c).

Also by virtue of the decision of the Court below, the Sixth Circuit in now in conflict with the 1st and 7th Circuit courts of appeal on the issue of whether Debtors, in "asset", as opposed to "no-asset" cases, have standing to appeal a decision of the bankruptcy court which affects their bankruptcy estate and which forecloses the Debtors from an opportunity to emerge from bankruptcy with a surplus.

Debtors were denied standing to appeal a decision of the Trustee which resulted in the dismissal of an adversary proceeding initiated by them to recover, potentially, the largest asset of their estate. The Debtors were also denied their right to secure a determination of the validity or "value" of a claim filed against their estate, as that claim was disposed of as a part of the Trustee's compromise of the adversary proceeding.[8] Thus, standing to appeal was denied which would have otherwise been accorded under Rule 3007.[9]

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8. Mulligan v Sobiech, 131 BR 917 (DC SD NY 1991); In Re Chateaugay Corporation, 64 BR 990 (DC SD NY 1986).

9. Supreme Court Rule 10.1(c) provides an additional applicable ground for the granting of the writ in this case, i.e the significance of the federal question involved. Subpart (c) provides, in part,

> "(c) When a ...United States Court of Appeals has decided an import' ant question of federal law which has not been, but should be, set- tled by this Court, or has decided a federal question in a way that conflicts with applicable decision of this Court."

Each of these issues are significant in the administration of the bankruptcy laws. This also is a valid basis for granting of the writ.[10] The "standing" question, as described in Andreucetti, in El San Juan Hotel and in the present case, indicates a lack of congruence among the circuits on a significant bankruptcy issue, given the special or peculiar relationships which exist among Trustees, debtors, creditors and litigants in both adversary proceedings and in claims objection proceedings. Thus, the standing issues, presented by this case, have not yet been resolved by this court. The writ should be granted under either Rule 10.1(a) or under either of the grounds set forth in Rule 10.1(c).

This case commenced as a voluntary Chapter 11 but was converted to Chapter 7 over the Debtors' strenuous objections. The limitations or restrictions placed

10. See Segal and Katchen, above.

upon the rights of Chapter 7 Debtors by virtue of the powers and duties of the Chapter 7 Trustee, with the resulting limitations on Debtor "standing", offer the prospect of the imposition of onerous burdens on both Debtors and their creditors. The standards by which estates are administered and the extent of the rights retained by a Debtor in a Chapter 7 liquidation, which that debtor does not voluntarily seek, should be the subject of definitive guidelines. Those guidelines are not supplied or clarified by the 6th Circuit decision in this case.

In the absence of a firm, concise and identifiable foundation, created by the bankruptcy court, upon which to construct their review, as was envisioned by, and required in, TMT and the circuit examples noted, the lower courts, in the present case, were forced to work "backwards". The lower courts were forced to canvass, or attempt to canvass, the

extent of the court file and determine the extent to which all that preceded the settlement hearing "might" have factored into the ultimate decision of the bankruptcy judge. Such an approach stands "TMT" on its head.

The lower courts in the present case quite obviously were left to speculate about the propriety of the bankruptcy court decision because the bankruptcy judge did not describe in any concrete terms what weighed in his decision or what motivated him to conclude that the settlement proposed was an appropriate one. Indeed, a review of the transcripts of the settlement hearing (A105) and the hearing on the motion for rehearing (A42) raises serious doubts about the matters considered and about how those matters were resolved. The approval of such an apparently loose or informal compromise methodology by the 6th Circuit opinion places that circuit at odds with each of the others noted above, and with "TMT", as well.

In the absence of predictable and identifiable procedures and standards for the generation and review of Rule 9019 compromises, bankruptcy debtors, and their creditors, each of whom, in bankruptcy, retain a diminished control over their affairs, could easily fall victim to the most powerful or the most persistent of creditors or litigants, whose only obstacle would be that of the "neutral" Trustee, whose primary duty tends toward settlement or compromise. The Trustee's duties and objectives make him no match for the persistent individual litigant and therefore the Trustee's conclusions and recommendations about the merits of a controversy, or the wisdom of its proposed resolution, are not determinative under the Rule. For that reason, the fully informed and independent judgment of the bankruptcy judge is required to assure that a compromise is "fair" or "reasonable".

Unless that bankuptcy judge identifies, in concrete terms, those matters which he considered and why those matters led to the conclusion he reached, no review would ever be possible.

The present case is not a "no-asset" case.[11] It is also not a case where these Debtors purposely selected Chapter 7 liquidation. The settlement or compromise at issue here involved potentially the largest asset of the estate. These Debtors had more rights than were accorded them in the lower courts on the issues involved here and the bankruptcy court had more duties under the code and case law than it performed. The Rule 9019 standard approved by the 6th Circuit in this case does not accord with TMT or the circuits noted.

TMT states that "without evaluation of

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11. The Debtors assets exceeded liabilities at the outset of the case, (A241-242) and the magnitude of the claim compromised clearly supported their "standing" arguments.

the facts or analysis of the law" review is not possible because "an appellate court... must have a basis for judging the exercise of the trial court's discretion."[12] In the present case we have neither and the court of appeals has, in its decision, effectively dispensed, hereafter, with that TMT standard by failing to require the bankruptcy court to observe its requirements.[13]

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12. See also Matter of AWECO, above at p. 299, "An approval of a compromise, absent a sufficient factual foundation, inherently constitutes an abuse of discretion."

13. Only the 8th Circuit, in In Re Flight Transportation Corporation Securities Litigation, 730 F 2d 1128 (8th Cir 1984), gives any arguable indication that some "lesser" standard might be acceptable, however, it is unclear what limits that court might permit because that decision also reversed, in part, because of inadequate findings on certain of the issues compromised.

CONCLUSION

The decision of the court of appeals conflicts with this Court's decision in TMT Trailer Ferry and with decisions of those circuit courts noted above. The decision of the Sixth Circuit Court of Appeals in this case must be reversed.

Respectfully submitted

Lester N. Turner
1005 Timber Pass
Harbor Springs, MI 49740
(616) 526-9222
Attorney for Petitioners